89-854

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DOROTHY SILVERMAN, Administratrix, Estate of FRED R. SILVERMAN, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented [1]

1. Whether federal estate laws regarding federal estate taxes imposed upon the California decedent's probate estate in this case, were and are supreme and completely unaffected by any California legislation including laws of exemptions from taxes.

2. Is it not the law that Respondent has a (Federal) mandatory, statutory tax imposition and collection plan, which fixes the exact time, sequence and manner of collecting federal estate taxes regarding California decedent's probate estate, completely free from any California legislation, including tax exemptions; that that plan includes collection by levy, within a matter of 70 days from the date of the assessment and also collection by a civil action ("a proceeding in court").

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[1] This case involves a Federal Estate Tax regarding a California decedent's estate. Respondent assessed on November 27, 1964 but neither obtained a collection extension nor levied nor sued for the tax until it filed this case on December 6, 1976, 12 years and 9 days after its assessment instead of within 6 years from it.

3. Is it not the law that the remedies of levy or suit, are disjunctive, i.e. alternatives.

4. Is it not the law that the federal plan for imposition and collection of federal estate taxes states the only exceptions from levy for federal estate taxes.

5. Is it not the law that there are federal statutes of limitations fixing the times for Respondent to impose and collect federal estate taxes, and that the same include that assessment shall be made within 3 years after the federal estate tax return is filed and that the levy be made within 6 years after the assessment (or a period fixed by a written agreement of extension) and that the action ("a proceeding in court") be begun within 6 years of the assessment (or the period fixed by an extension agreement).

6. Whether it is the policy of our Country and the mandated policy for the imposition and collection of the federal estate taxes that the remedies of levy or suit be promptly and

certainly pursued in order to obtain prompt and certain collection.

7. Whether a motion to recuse a Judge of a Federal Court of Appeals for impropriety, or the appearance of impropriety, under 28 U.S.C. §455(a), is directed to the Judge personally and that the Judge has the duty to determine "for himself" that motion; no other judge or judges in the same or any other Court can hear and determine the motion; that disqualification of a judge cannot be waived.

8. Whether it is an act of judicial impropriety for the other members of a panel to purport to decide a motion to recuse another member of the panel for that member.

9. Whether a party, who has raised material issues, which have not been decided by a federal circuit court of appeals, although there is substantial evidence in the record, has a remedy requiring that determination, including the determination of issues which have not been decided because of the failure to make findings on material issues by appropriate

Orders by this Court.

10. Whether a decision which does not follow the statutory or case law, which states the law exactly contrary to this Court's statement of the law on the point, which does not follow this Court's decision although it was cited to it, which decision was based upon a Motion record and reviewing a summary judgment, that is sought to be applied in a subsequent trial of the same case (the trial including documentary and testimony evidence), including proof of correct statutory and case law, and the application of which decision would result in injustice, can be used as a conclusive "law of the case".

11. Whether the doctrine of "law of the case" is merely a matter of policy and convenience and in no way a limitation of the judicial power of a court presented with the matter.

12. Is it not the law that appellate courts have the judicial power to consider and apply matters not apparent of record, occurring after the judgment and during the appeal, and which

relate to the subject matter, and which establish the truth of a matter of fact and a matter of law, contrary to representations and findings made theretofore regarding said matters, and which were known to the makers of the representations and the finders of the findings at the time of the representations and findings.

13. Whether an appellate court not only has the power, but is compelled, to receive evidence dehors the record affecting the proceeding in a case under its review.

14. Whether a party who considers certain events in litigation, including what the party considers clerical and judicial irregularities, also misconduct of opposing counsel, also clerical violations of FRCP and FRAP Rules regarding clerks and judicial noncompliance with certain Canons and provisions of the Code of Judicial Conduct, has the remedy of specifying the same in briefs in support of a Petition for Writ of Certiorari submitting the same in a Petition

for Writ of Certiorari for the purpose to obtain a complete review of the entire case, in order to permit the Court to properly determine appropriate relief and, the principal thrust of such a Petition for Writ of Certiorari being a determination of questions presented on the principal issues involved in the appeal and to insure, the purpose being to seek a sufficiently broad review not only of those principal issues but included matters.

15. Whether the party who considers certain events in litigation, constituted clerical and judicial irregularities, also misconduct of opposing counsel, clerical violations of FRCP and FRAP Rules regarding clerks and full compliance with certain Canons and Code of Judicial Conduct has a remedy of specifying the same in briefs in support of a Petition for Certiorari, submitting the same only for a complete review in order to permit this Court to properly determine appropriate relief.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DOROTHY K. SILVERMAN
ADMINISTRATRIX OF THE ESTATE
OF FRED R. SILVERMAN, DECEASED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Parties Below.

The parties are Petitioner and Respondent.

Opinions Below

There have been two appeals in this case. The District Court did not render an opinion in either. It entered a judgment in each. The opinion of the Court of Appeals in the First

Appeal, dated June 16, 1980, is reported in 621 F.2d 961, cert. den. 405 U.S. 913.

The opinion in the Second Appeal (and the one involved in this Petition) was dated October 13, 1988 and is not yet reported. See Appendix 12.

Jurisdiction.

The judgment sought to be reviewed was dated October 14 and entered October 18, 1982.

The order denying Petitioner's Petition for Rehearing was dated June 2, 1989. The time within which this Petition can be filed was extended to September 30, 1989 by the order of Justice Sandra Day O'Connor, dated August 28, 1989. It was further extended to October 30, 1989 by her order dated September 27, 1989.

Statutes Involved.

Federal Statutes: All in 26 U.S.C. §§: 2001, 2002, 2031, 2033, 2203, 2204, 2205, 6301, 6303(a), 6321, 6322, 6324(a), 6331, 6332, 6334, 6501(a), 6502, 6503, 7403, 7701.

Also 28 U.S.C.: §§§144, 455(a); 31 U.S.C. 3713.

California Codes: Probate Code: §950, 974.

Statement of the Case.

(1) Relevant Background:

Petitioner and decedent were married November 10, 1932 until his death on August 18, 1963. On December 16, 1943, they executed a contract to make irrevocable wills leaving all their property (all community) to each other and appointing each other executor and executrix without bond. They made such wills, and Petitioner relied on said contract and wills. However, decedent went to the trust department of the Union Bank regarding a new will, was referred to an attorney he had never met and never saw since, and executed a new will dated May 2, 1958. It did not leave all the estate to her, but only part (the other to his sisters and nieces); it did not appoint Petitioner executrix, but the bank as executor; the estate consisted principally of Union Bank stock, traded over the counter; the will created a testamentary trust (never effective) with the bank as trustee and "froze" the stock

for 5 years. The bank petitioned to probate the will and for its appointment as executor. Before the hearing, it was informed of the contract but consistently refused to recognize it. The will was admitted and executor appointed on September 27, 1963. The Inventory, dated December 26, 1963 was filed on January 8, 1964. It appraised the assets at $920,439.37 (which included 10,000 shares of the Union Bank stock at $79.79 each for a total of $797,916, personal property and effects at $7,500 and the balance in cash. On February 7, 1964 a dividend of 2,000 shares of Union Bank stock was declared, increasing the assets by $159,593.23, totalling $1,080,032.57. Later 480 shares dividend was declared. Petitioner had no funds at all; no bank account; all the assets were in the possession of the bank; no estate income was ever distributed to Petitioner during the executor's tenure. She was compelled to obtain a limited family allowance in 1964. She was militantly opposed in that and <u>all</u> proceedings by the other heirs

and the executor (who should always be completely impartial). Petitioner filed two actions in the Los Angeles Superior Court, one to quiet title to the stock and the other for quasi-specific performance of the contract, against the executor, as such, and the other heirs. All militantly opposed her. On March 12, 1968, she recovered an Equity Judgment.

The judgment adjudicated the contract valid, the will in violation of it and of no force or effect against her as to its dispositive provisions, but effective as to the appointment of the executor; she took under the contract and not the will; the executor held all the property for her under a constructive trust and all to be distributed to her under the contract and not the will.

Neither the executor nor the other heirs appealed, and the judgment became final as to them 60 days after its entry. Petitioner appealed only from that portion of the judgment which failed to enforce the part of the contract as to her appointment as executrix.

Pending the appeal, she obtained removal of the bank and her appointment as administratrix by order dated June 27, 1969. She always owned her community share (1/2) and it never became part of decedent's estate. Northeastern Pennsylvania Bank & Trust Co. v. United States, 387 U.S. 213. She then also owned decedent's share as of the date of death. The Equity Judgment placed her in the position she would have been if decedent's will was in accordance with the contract. Community is inventoried but her share was not liable for the taxes but only for community property debts (during his lifetime) since both spouses are liable for such community debts. There were none, so she owned 100% of all the assets subject only to administrative expenses. On her appointment as administratrix, she became the "trustee" of the constructive trust (fixed by the contract) in place of the executor and the interests of the "trustee" and "beneficiary" vested in her.

On appeal, the court affirmed with a pragmatic decision that the appeal "...as a

practical matter, deals solely with the fees paid or yet to be paid for services rendered by the bank as executor and its attorney" prior to its removal. Petitioner's attorney structured the assets in a depository account.

On October 1, 1963 the first notice to creditors was published in the estate. This required any creditors of decedent during his lifetime to file claims within 6 months or their claim would be barred. The Probate Court lost jurisdiction over the claim if filed too late. On October 20, 1965 Respondent filed a "proof of claim" in the estate and a second one on October 18, 1966. They were nullities since estate taxes are not debts of decedent during his lifetime. They arise after death. Respondent was completely free of any obstruction since state statutes of limitation, in this context, did not apply to it.

(2) Respondent's Knowledge of All Estate Proceedings:

On October 20, 1965, Respondent filed a Request for Special Notice of all estate

proceedings; it admitted it received all of them (I-R 50).

Respondent received notices of all proceedings including those leading to the following orders:

1. Order of June 27, 1969 removing the executor and appointing Petitioner administratrix; order of August 28, 1969 transferring half of the stock and $50,000 in cash (less than 1/2 of the cash) to Petitioner individually (bear in mind that she owned 100% of all the assets under the Equity Judgment entered March 12, 1968); and the following orders: June 1, 1972; May 16, 1973; June 30, 1977; June 27, 1979; August 29, 1979; September 8, 1980; June 17, 1981; May 10, 1982. Said withdrawals, all cash, totalled $307,623.24. From that amount $55,124.75 was paid to the former executor and its attorney. Appellant received then $252,498.49 in addition to the $50,000 received by the order of August 28, 1969

for a total of $302,498.49.

It should be borne in mind that these were withdrawals from the depository, which received slightly more than half of the cash and half of the stock by the order of June 27, 1969. Petitioner retained the receipts from the August 28, 1969 order; the same increased in dividends, cash and stock as well as interest on cash so that Petitioner always had at least 3/4 and probably more of the amount in the depository account since she was able to enterprise the funds more than the depository.

On March 16, 1982 the depository had $662,197.86 in assets. The trial was on September 14, 1982, 6 months and 2 days later. So that between the depository and Petitioner's separately possessed funds (however all were hers) totalled in excess of $1,000,000 after the trial. Petitioner's attorney set a hearing on July 24, 1975 to close the estate. In 1974 Respondent's attorney raised with Petitioner the matter of the tax. Her attorney attempted settlement, which failed. Respondent filed

this action on December 6, 1976.

621 F.2d 961 reversed and remanded "...to determine whether under the principles this opinion enunciates the United States is entitled to prevail in its effort to reduce the assessments to judgment".

The first sentence in the opinion, 621 F.2d 961 reads "This case involves a somewhat obscure, but nonetheless important, area lying in a junction of the federal law fixing the manner in which the United States collects estate taxes and the state law governing the probate of decedents' estates".

The area of law is not obscure but most important since it involves constantly thousands of decedents' estates in this Country and undoubtedly thousands yearly in California and more thousands in various states that have similar probate structure. On page 964 it states "The administratrix, on instructions by the probate court resisted on the basis of section 6502(a). Probate proceedings have not been concluded."

3. Subsequent Proceedings:

After the remand from 621 F.2d 961, hereinafter referred to as Silverman, Respondent took the depositions of Petitioner and her brother (Edward Kapstein). Petitioner filed a law and motion proceeding to compel Kapstein to properly give his deposition. That proceeding was such that unusual events occurred that led to a disciplinary proceeding regarding the judicial officer. On the June 7, 1982 pre-trial hearing (the same judge who rendered the Summary Judgment) asked Respondent's attorney if he observed, in substance, whether Petitioner appeared capable of acting as such, the answer was negative, in substance (by William J. James); the trial followed on September 14, 1982 for 1 day. Petitioner's assignments of trial errors were extensive but specific, including misconduct of Respondent's attorney and the court, including in colloquy and ruling errors including evidence and other proceedings. The assignments specifically referred to the

record with citations of controlling authorities. Petitioner objected to the findings, conclusions and judgment, no hearing was held on them. Judgment was dated October 14 and entered October 18, 1982. The clerk gave Notice of Entry only to James; he was aware of it since the certificate of service named only him; he did not inform Petitioner's attorney until days later when the latter inquired of him; the clerk told Petitioner's attorney on inquiry that it was his duty not the clerk's to watch the proceedings; he informed the Chief Clerk of the Court and his staff legal consultant that he did not know that Petitioner's attorney was in the case, although it was pending for 6 years. Petitioner made post-trial proceedings requesting correction of certain irregularities. That was denied. In December 1982 (post-judgment) the Court filed a letter to it which was not relevant to the issues which constituted, in the opinion of Petitioner, judicial misconduct (violation of

applicable Canons). The appeal proceedings have been extensive, the first Panel consisted of Circuit Judges Kennedy and Poole and District Judge Schwarzer. There were various interim proceedings in the estate. There were various motions on the appeal, Respondent's motion to dismiss the appeal was denied by order dated March 11, 1986, which then added serious sanction language directed to Petitioner's attorney prematurely, denying any extensions of time for a reply brief (which was not mandatory and might not ever be filed). (It was, timely). Petitioner Moved to Reconsider and Modify the said Order to delete the improper language, citing authorities, classified that portion of the order prejudgment. Petitioner's said Motion was not entered in the docket and it was not in the case file. Petitioner's efforts, through professional organizations, to obtain a certified copy thereof failed because it could not be located. The Oral Argument was set for January 7, 1987. It was officially tape

recorded. Despite the complexity of this case and the extensive record, Petitioner's attorney was given 15 minutes. Most of that time was taken up by inquiries by the Panel as to whether Petitioner's attorney had the authority to prosecute this appeal. Various colloquy occurred, Petitioner's attorney taking a firm position as an officer of the court and referring to the record. The details are in the record. Justice Kennedy stated that Silverman states "the law of the case" and would not permit argument by Petitioner on it. He stated Petitioner's attorney had little "hope" with issues regarding the findings. This, although there were no findings on material issues and some of the material findings were not supported by the evidence. Petitioner's attorney started to refer to the misconduct of Respondent's attorney with reference to certain material issues. Justice Kennedy said he would not hear any complaints against Respondent's attorney.

The proceedings were such that

Petitioner's attorney did not receive an opportunity to make any substantial statement of Petitioner's case. Most of the 15 minutes were taken up in the inquiries which were prosecutorial and repetitive, several times by each of the Panel members. He sought to correct (on "rebuttal") a serious error, in colloquy between the Panel and Respondent's attorney. He was allowed "1 minute". It was over before he could start. His attempt was to cite Northeastern, supra, since the Panel had stated the law inconsistent with it. He was denied that opportunity. These matters relate to the last Question Presented.

Eight and 1/2 months after the Oral Argument the Court ordered a Limited Remand stating that on the Oral Argument it appeared the parties conceded that in the early stages of the estate Petitioner's community property share was transferred to her which made it accessible to the tax and requested findings which the trial court had not made as to what if any funds were accessible at certain dates

(beyond the 6 year statute of limitation) and what, if any, funds were not under the control and custody of the Probate Court, for the tax. Those dates included the date the action was commenced on December 6, 1976. This was irrelevant. The relevant period was the 6 year statute of limitation on the assessment, November 27, 1964 to November 26, 1970.

The remand proceedings in the trial court were extensive, with 3 hearings, numerous pleadings, 3 reporter's transcripts (replete with errors). Only the findings were transmitted to the Court of Appeals in 1988 but not the record upon which purportedly based.

Petitioner's Motion to Augment the record to include the same was denied.

Justice Kennedy continued on the Panel until he became Associate Justice of the Supreme Court of the United States. On June 13, 1988 Judge Alarcon was "drawn" to the Panel. Petitioner's Motion to Recuse him was on the obvious grounds that he had heard and determined the facts and law in Silverman.

Judge Alarcon did not decide that Motion. He has never decided. The other 2 members of the Panel purported to decide it for him and denied the same. Statements in the denial order were such that Petitioner's attorney moved to reconsider and vacate the order and direct the Motion to Recuse Judge Alarcon to him. He took exception to the description of the Motion to Recuse as "frivolous", cited direct authorities showing to the contrary. He emphasized that it was inconsistent with the explicit language of 28 U.S.C. §455(a); also that such a serious motion and the serious duty of the judicial officer to whom that motion was directed could be considered "frivolous".

Thereafter Judge Alarcon joined the other 2 in making certain orders, including purporting to resubmit this case as of the date of the Oral Argument and later to another prior date in September. Petitioner made 7 motions, under 1 cover, referring to specific prior proceedings and orders, seeking the record to be augmented not only on the principal record

of the trial but the record on the remand and to reconsider and vacate the orders purporting to deny the Motion to Recuse. These motions were denied by the Panel including Judge Alarcon. The Opinion was filed October 13, 1988. Petitioner's Petition for Rehearing did not suggest a hearing en banc only because Justice Kennedy on the Oral Argument stated he would not process it for such a hearing.

The Petition for Rehearing pointed out that although Silverman held Respondent could not and did not levy, levies were actually made in 1966 and 1986, (and July 21, 1989) and referred to and emphasized Bowers. It took serious issue with the statement that only $32,500 were distributed and that the estate amounted to $450,000. Those figures are untrue as noted. As noted, the assets exceeded $1,000,000, shortly before the trial. The Petition for Rehearing was denied on June 2, 1989.

The said 7 motions included the motion to reconsider the issue of the tape recording of

the Oral Argument and the total record and Petitioner's right to inspect the same and to hear the same tape to which, (the Opinion states) Judge Alarcon listened.

4. Conditional Payment of the Tax:

In 1983 Petitioner's attorney took proceedings to close the estate, for instructions and other proceedings including his suggestion that the tax be paid conditionally upon a stipulation that it would not prejudice the final determination of this Appeal. At that hearing, among other proceedings, the court examined Petitioner under oath regarding the final determination of this Appeal, suggested it should be completed. She agreed. The tax was paid, under said condition, in open court stipulation, on July 25, 1983 in the amount of $130,836.11 (from $50,026.30) explicitly without prejudice to the completion of this Appeal.

Argument.

[Inadvertently omitted supra in transcription of dictation that the second decision (Appendix

12) was merely a supplemental memorandum decision to Silverman. This case is entitled to a full scale decision in the traditional form and content. That decision does not meet the standards for appellate opinions. They require 5 parts, i.e., the nature of the action, questions to be decided, the essential facts, determination of the questions, disposition of the case. Witkin, Manual on Appellate Court Opinions, Sec. 54, quoting and applying A.B.A. Committee Report.

[Not only the form but the substance of defects in the Opinion were set out in the Petition for Rehearing.]

Neither the trial court, in the 2 phases therein, nor the Court of Appeals, in the 2 appeals, mentioned the Equity Judgment, did not give it full faith and credit, did not apply it, were mistaken about the status of the community property interests of Petitioner and the effect of the Equity Judgment. Silverman did not cite any Supreme Court case except Markum v. Allen, 326 U.S. 490. Markum involved

various decisions, including Bowers. It knew Bowers before Silverman. Not one word about it is in Silverman. Not one word of it is in the second decision. Again, not one word about the Equity Judgment in either decision.

Silverman is analyzed in Petitioner's briefs, what it decided, more importantly what it did not decide.

As noted, supra, it construed alternative remedies of levy and suit as conjunctive, completely contrary to the explicit language of the statutes and contrary to Bowers (which involved a similar federal statute). Although Petitioner repeatedly raised the point, Silverman never defined "custody and control" of a court, particularly the California probate Court. It equated the fact that the estate has not been concluded to "custody and control". The probate court has no custody or control other than "control", administratively, over the executor or administrator. "Custody" is theoretical. Custody actually is in the executor or administrator who is a stake holder

on instructions by the probate court which is a special court of limited jurisdiction. It has no jurisdiction at all over any action.

The trial court, in the first phase held, (findings and conclusions) that collection efforts by Respondent were not "hindered by a pending probate proceeding in California since a federal estate tax claim has priority in such a proceeding...and since the United States may always proceed by a levy pursuant to 26 U.S.C. §6331 et seq.; a proceeding by levy would supercede any state probate proceeding" citing Hoye v. United States, 277 F.2d 115, 119 (9 CA).

Silverman referred to Respondent's alleged policy "not to levy on assets of a decedent's estate while in the custody of probate court".

That is incorrect factually and legally. Legally there is no exemption to levy for federal taxes, including estate taxes, under 26 U.S.C. 6334. Factually, levies were made, as noted, in 1966, 1986 and even later, the latest on July 21, 1989.

It stated that if a decedent had substantial assets not in control or custody of the probate estate compared to those in the control and custody of the estate, the statute was suspended.

The fallacy with that is that it is not realistic nor is it legally correct. All the assets of a decedent are listed and inventoried in his estate. If the Court is referring to assets such as inter-vivos or other trusts, while they may not be inventoried in his probate estate, they generally end with his death and pass on to the beneficiaries. If there are decedent's assets outside the probate estate, they still are within his gross estate and a special federal tax lien has been imposed, by operation of federal law, upon all decedent's assets as of date of death, by 26 U.S.C. §6324(a).

The only assets not subjected to the lien but divested of it are the following: "...except as such part of the gross estate as is used for the payment of charges against the

estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien".

That compares exactly with Pr. C., 950.

Pr. C., 974 provides taxes (valid) must be paid before closing the estate. The Probate Court has no jurisdiction to waive any statute of limitation. That is the reason for the orders directing the Petitioner as administratrix to oppose the claim for the tax.

Silverman holds the suspension runs from the beginning to the closing of a probate estate plus 6 months thereafter.

The fallacy of that reasoning is obvious. It holds the statute is suspended and that means the 6 year statute from the beginning to the closing of the estate plus 6 months thereafter.

That would obviously eliminate all statutes of limitation and would make no sense since the 6 months after closing has no meaning. Further, that reasoning would have the following arithmetic result: Suspension

from the opening to the closing of the estate plus 6 months plus (the suspension is of the statute of limitation period) the full amount of that period, i.e. additional 6 years, because the statute of limitation period would not start until the end of 6 months after the closing.

As to the second decision, it merely "rubber-stamped" Silverman. The same fallacies in Silverman apply to the second decision.

The second decision emphasized that Silverman was "the law of the case". Petitioner disagrees.

However, inconsistently, and ironically, it cited 2 cases in the same court, Kimball v. Callahan, 590 F.2d 768 and Richardson v. U.S., 841 F.2d 993.

Richardson, headnote 1 states generally the rule and exception, i.e., in that case, "an intervening controlling authority". Kimball, headnote 1 states "it as a general rule" implying an exception. Its headnote 2 states is not an inexorable command...unless evidence

on subsequent trial was substantially different" and subsequent controlling authority or "decision was clearly erroneous and would work manifest injustice".

Respondent engaged in erroneous proceedings, purporting to proceed in probate contrary to the simplest procedure in it. It should have known that the creditor's claims procedure in probate does not apply at all to federal estate taxes, first because those taxes are post-death and not a lifetime claim against decedent and second because federal statutes governing federal taxes are not at all affected by state legislation and the probate court is the creature of state legislation.

Respondent, having committed itself, as noted, under oath, that its duty was to either sue or levy within 6 years it permitted the Court of Appeals in the First Appeal to develop its unusual but illogical and legally erroneous concepts and statements. The same applies to the second decision, which merely adopted Silverman as the law of the case.

The trial court in the second phase, was obviously overwhelmed by Silverman. Silverman engaged in an extended irrelevant exercise, which has done a disservice to Respondent, its tax structure, to the judicial system, and to Petitioner. Respondent had the authority, in fact a mandated duty, to collect the taxes immediately after 70 days after the assessment, i.e., 70 days after November 27, 1964. This will be demonstrated infra.

Consideration of the Questions Presented

(1) The First Question Presented.

This involves the Supremacy of the federal tax laws regarding Federal estate taxes.

It is ironic that Petitioner emphasized from the start the Supremacy of the federal laws that determine federal taxes not only as to their imposition but also as to their collection; that no state can obstruct the same by legislation including exemptions.

Yet, Respondent has obviously sought to avoid the legal consequences of Respondent's original indifference, or intentional

disregard, of its mandated duty to collect estate taxes in this case, by its resort to its unprecedented exercise which has consumed 25 years next November 27. It has created confusion and some concern in the judicial system, particularly the probate estates and more importantly upon taxpayers, and even more specifically, representatives of California probate estates, i.e., executors and administrators.

It clearly impugns the Supremacy and the integrity of the federal tax system in the involved regards.

The Supreme Court referred to the "Supremacy Clause which provides the underpinning of the Federal Government's right to sweep aside state-created exemptions". United States v. Rodgers, (1982), 461 U.S. 677.

Referring to the enforcement tools, i.e., levy and suit, this Court, in Rodgers, majority opinion (Brennan, J.) stated that levy was one of the "distinct enforcement tools available to the United States for collection of delinquent

taxes"; it stated that the Government could also sue, obtain judgment, exercise rights of a judgment creditor or pursue levy under 6331; that levy did not require judicial intervention and (p 683) "the common purpose of this formidable arsenal of collection tools is to ensure the prompt and certain enforcement of the tax laws in the system relying primarily on self-reporting". It stated that the matter was controlled by federal law, citing United States v. Mitchell, 403 U.S. 190.

United States v. Summerlin, 310 U.S. 414 also declared the supremacy of the federal tax laws regarding federal taxes.

(2) The Second Question Presented.

This involves the United States mandatory, statutory tax plan for the imposition and collection of federal taxes including federal estate taxes.

The plan is simple, explicit and the statutes fix the exact time, sequence and manner of collecting federal taxes completely free from any state legislation.

There has been persistent failure to recognize that "estate" is merely a name, not an entity, as partially noted supra, no one administering the estate, neither the probate court, nor the executor nor the administrator has title to any assets of decedent; that the "taxpayer" in the federal tax statutes, regarding federal taxes, more specifically federal estate taxes, is the executor or administrator and each of them is personally liable with his own personal assets for the payment of the tax if he does not pay it, while administering the estate, from the estate assets in his "possession".

It is a "perfect" plan that does not involve the United States in any controversial series of events (other than such as this case because of Respondent's non-compliance with its own laws).

It involves only the period of 70 days after the assessment, then the taxes may be collected either by levy or suit.

The following is the basic tax plan.

All sections are in 26 U.S.C.

§2002. The tax "shall be paid by the executor". This is defined by §2203 as being the executor or administrator or if none "any person in actual or constructive possession of any property of the decedent".

§6301. "The Secretary shall collect the taxes...".

§6303. As soon as practicable, and within 60 days "after making an assessment, the Secretary shall give notice to each person liable for the tax and the amount and demanding payment".

§6321. "If any person liable to pay" the tax, neglects or refuses to pay, the amount of it including interest, penalty and costs which shall be a lien "...upon all property...belonging to such person".

It is clear beyond any avoidance that the executor, administrator or the person in actual or constructive possession of any of decedent's property is the one who is personally liable for the tax.

§6324(a)(2). If the estate tax is not paid when due (by the "taxpayer", "then the spouse, transferee, trustee, surviving tenant, person in possession under a power of appointment or beneficiary ...shall be personally liable for such tax" transferred by any such persons, or transferee of any of such of them, the lien shall attach on all the property of such persons.

§6331(a). If any person liable to pay the tax ("taxpayer") neglects or refuses to pay within 10 days after notice and demand, "it shall be lawful for the Secretary to collect the tax plus additional amounts by levy upon all property belonging to such person".

§6332(a). On demand of the Secretary upon any person in possession of any property subject to the lien, they shall "surrender such property...to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to the attachment or execution under any judicial process" (that defines custody and control).

The time schedule and the acts required to be done in the collection by the Secretary and the mandatory collection of the taxes is as follows:

§6501(a). He shall make the assessment within 3 years after the estate tax return is filed. No action in court may be begun without assessment after that time.

§6502(a). If the assessment is made within the 3 years, collection may be made by levy or a proceeding in court if it is made or begun within 6 years after the assessment and prior to the expiration of any period extended in writing (there was no extension).

The periods of limitation are suspended as follows:

§6503(a)(1). Periods stated in §6501 and §6502 shall be suspended for the period during which the Secretary "is prohibited from making the assessment or from collecting by levy or a proceeding in court".

§6503(b). Assets of the taxpayer "in control or custody of court": Limitation

period "shall be suspended for the period that they are in the control or custody of a court and 6 months thereafter".

There is the explicit statutory federal tax plan for the imposition and collection of such taxes. That plan mandates the Secretary of the Treasury to collect the tax and (as noted) fixes explicitly the time and manner for his doing so. He has no discretion and there is no policy contrary to the explicit statutory provisions. It is the policy of this Country to expedite the collection of all taxes. The Supreme Court has so held emphatically. United States v. Rodgers, 461 U.S. 677. The federal tax laws are supreme. "Supremacy Clause which provides the underpinning of the Federal Government's right to sweep aside state-created exemptions". Id pp 700-702.

The Secretary is given 2 alternative remedies, i.e. levy or suit. Id p 683.

The reason is apparent "the common purpose of this formidable arsenal of collection tools

is to ensure the prompt and certain enforcement of the tax laws in the system relying primarily on self-reporting". Id p 683.

(4) The Explicit, Mandatory Tax Plan for Collection of the Tax.

The relevant timetable regarding the subject estate and the said tax is: Date of death, August 18, 1963; Executor appointed September 27, 1963; the estate tax return, 706, filed November 4, 1964; assessment filed November 27, 1964. The assessment must be made within 3 years of the assessment (§6501(a)). It was.

Taxes are due and payable on the assessment.

As noted, the Secretary did not follow the timetable, i.e. 60 days after the assessment on November 27, 1964 and 10 days after that (70 days), i.e. February 5, 1965. He had 6 years, i.e. to November 26, 1970 total. The United State's tax policy is for fast collection. Respondent filed this action on December 6, 1976.

26 U.S.C. §6321 imposes, on death, a general lien upon all property of decedent, who was a citizen or resident of the United States.

26 U.S.C. §6334(a)-(d) enumerates property which is exempt from federal levy for federal taxes. (c) provides "No other property exempt.

This case does not involve any such property listed in that statute. The federal estate tax is not a debt of a decedent; it does not arise during his lifetime but on and after his death. It is an excise tax on transfer of title of property, which occurs by operation of law on death. Title does not depend upon any document except as evidence of it.

It should be noted that the federal tax laws mandate the Secretary to collect the federal taxes. He breaches his duty to enforce the federal tax laws if he does not follow them precisely and timely, as mandated.

Note, supra, §6332(a) provides that upon demand, any person in possession of any property subject to the lien "shall surrender

it except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process". That defines "custody and control".

There is no "execution" or "attachment" in the probate estate.

There is another subsection of that section that if such person in possession does not surrender the property to the Secretary, he shall be personally liable for the tax, interests, costs and penalty of 50%.

Silverman (621 F.2d 961) held suspension under 26 U.S.C. 6503(b), i.e., "Assets of taxpayer in control or custody of the court. The period of limitations on collection after assessment, prescribed by §6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court...and for 6 months thereafter."

That taxpayer is the executor or administrator.

Union Bank's assets (millions) were not in the "control or custody" of the estate. That

statement shows the error of such construction of that statute in both decisions.

The individual assets of Petitioner were not under the control and custody of the court. Her community property share was not. Northeastern, supra. After the Equity Judgement, March 12, 1968, decedent's share was not.

All that Respondent had to do, after its assessment on November 27, 1964, while the Union Bank was executor, was within 60 days thereafter to give notice and demand for payment. If it did not pay, within 10 days after said notice and demand, Respondent could have levied on the Union Bank's assets.

More interesting, Union Bank was executor for 4 years and 7 months during the 6 years of limitation, i.e., November 27, 1964 to the date its Letters were revoked on June 27, 1969. Petitioner was administratrix for the rest of the 6 years, i.e., 1 year and 5 months, from June 27, 1969 to November 26, 1970.

Respondent could have levied against her

assets. Although her community property share was not part of the decedent's estate, originally and until the Equity Judgment (there were no decedent's assets after the said Judgment). They were owned by her individually. They were not liable for the tax as such as long as Petitioner was not administratrix. But when she became administratrix, owning said assets individually, she was subject to the same statutory plan of 60 days and 10 days.

The Union Bank could have been subject to not only the tax, interest and penalties but 50% additional penalty if it did not pay the tax out of its own assets.

The same applies to Petitioner.

That justifies the reference to square corners by Respondent and the requirement of rectangular rectitude from it.

25 years, next November 27, have been wasted and substantial burdens added upon Petitioner and Respondent, because of the obvious error, persisted in by the sovereign

and its resources of knowledge and personnel. What is most distressing to whomever knows of this matter, is Respondent's complete inactivity between the time it filed its alleged "proofs of claim" until it filed this action, 12 years and 2 months later.

The completeness of the federal tax plan, partially discussed supra, is further shown by 31 U.S.C. §3713 Priority of Government claims. That statute further discloses the fallacy of Silverman supra. The Court, in its extended exercise, stated that when there were assets substantial in value in relation to the total value of a decedent's estate, not subject to custody and control, will preclude suspension.

There is no statute so providing.

What about the priority payment of obligations to others when the individual or estate is insolvent?

That statute provides where there is insolvency, attachment, bankruptcy and the estate does not have sufficient funds to pay all debts, the claim of the United States

Government shall be paid first; if not, then whoever does not, is personally liable for unpaid claims of the Government.

That was a further example of the Supremacy of the federal tax laws.

(3) The Third Question Presented.

This involved Respondent's 2 alternative remedies for collection of the tax. United States v. National Bank of Commerce, (1985), 472 U.S. 713, 720.

Silverman held that Respondent was wrong in assuming that filing its 2 proofs of claim "commenced a proceeding in court". The 6 years had long past. Silverman was dated in 1980, 10 years later. It held that although Respondent could have sued the day after the assessment was filed (November 27, 1964) it had to have had both remedies available, i.e. suit and levy. It never explicitly stated that Respondent could not levy. Its said statement implied that it could not. It then held that despite that status, Respondent could sue, as it did, more than 6 years after the expiration

of the statute of limitation (referring to this action). Silverman also held, explicitly, that the alternative language of the statute, i.e. levy or sue (and the 2 alternative remedies have been continuously stated by this Court (as noted in the summary of its cited cases supra) was to be construed conjunctively and if it could not do both, i.e. both levy and sue, there was no bar to its right to sue (and it is assumed it included the reverse application, i.e. it could levy without limitation).

> Bowers, 273 U.S.346, supra, involved a federal statute that no suit or proceeding for collection of any taxes could be begun after 5 years from the date their return was filed. The government conceded it was barred for not filing a suit but was not barred from levy referring to a policy among other things. This Court (p 350) referred to the "...the general principle of policy applicable to all government that the public interest should not be prejudiced by the default or negligence of public officers (citation). The limitation applies to the petitioner and to the claims. It applies to suit; the only question is whether it also bars distraint. The provision is a part of a taxing statute; and such laws are to be

> interpreted liberally in favor of the taxpayer (citation). It has been suggested that no principle or the policy or other consideration that furnishes any reasonable support for the setting of the limitation against only 1 of the 2 authorized methods of enforcing collection.
>
> "The clause in controversy is no suit or proceeding for collection of any such taxes...shall be begun after the expiration of 5 years after the date when such return was filed."
>
> "...the court said there were 2 methods to compel payment of the tax, one a suit which was judicial, the other distraint which was executive. It also said:
>
> (the purpose of the enactment was to fix a time beyond which steps to enforce collection might not be initiated. The repose intended would not be attained if suits only were barred, leaving the collector free at any time to proceed by distraint. In fact, distraint is much more frequently resorted to than is suit for the collection of taxes. The mischiefs to be remedied by setting a time limit against distraint are the same as those eliminated by bar against suit..." (emphasis added).

It held levy is the most generally used remedy because, Petitioner submits, "among the advantages of...levy is that it is quick and relatively inexpensive". Id. 721. It also held,

> "But taxes are the life-blood ofgovernment and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt". Bull v. United States, 295 U.S. 247.

(4) The Fourth Question Presented.

This refers to the subject of exemptions from federal levy for federal estate taxes.

As noted, federal tax law is the exclusive authority for the imposition and collection of federal taxes, including federal estate taxes. 26 U.S.C. 6334 is the exclusive statute providing for exemption of property from federal levy. There are 9 specified exemptions under (a). (c) provides that no other property or property rights shall be exempt from levy. Exemption of property from federal taxes is determined by federal law. United States v. Mitchell, supra (403 U.S. 190).

(5) The Fifth Question Presented.

There are federal statutes of limitations,

as noted.

Regarding the federal estate taxes, involved in this case. 26 U.S.C. §6501(a) provides assessment shall be made within 3 years after the tax return is filed and if the assessment is timely, levy or suit shall be made or begun within 6 years after the assessment. Bowers v. United States, supra.

> "...the lien sought to be foreclosed is only an incident to the claim for taxes it secures; and that, the claim for taxes barred, the lien falls with it".

United States v. Stone, (5 CA), 1958, 257 F.2d 685, 87.

> "...the complaint and the amended complaint failed to state a claim upon which relief could be granted for the reason that it appears on the face of the complaint and amended complaint that the alleged claims arose more than 6 years prior to the filing of the action..."

Petitioner submits United States v. Besase, 319 F.S. 1065, 1066,

> "...should the Government fail to bring to bring action against the taxpayer within the 6 years after assessment...the Government is thereafter barred from foreclosing a tax lien on the property of a taxpayer." Id. 1068.

Petitioner submits Vibradamp Corp. (Cal. 1966) 257 F. S. 1935. It involved the government's inactivity regarding a contract claim until after the estate was closed and then its attempt to reach individual representative. It was unsuccessful. The court said, "...it requires little imagination to visualize the extent to which the validity of such a doctrine would impair the closing of probate estates throughout the country".

(6) Sixth Question Presented.

This involves the necessity of "prompt & certain" collection of federal taxes. United States v. Rodgers, supra "Prompt and certain availability" is always "an imperious need" because of which levy is resorted to more often. Bull v. United States, 295 U.S. 247.

(7) Seventh Question Presented.

This referred to the Motion to Recuse Judge Alarcon. The basis of the Motion was that he participated in the Panel that decided the First Appeal. He pre-determined then the facts and law and retained his opinion through

the Petition for Rehearing. No judge could be expected to contradict himself and change the decision in the same case. More significant, he could not expect the other 2 members to do so. The statute, 28 U.S.C. 455(a) explicitly provides the judicial officer listed "shall" disqualify himself in any proceeding in which "his impartiality might reasonably be questioned".

That is clear language which does not require "construction". The mandate to disqualify is upon the named judicial officer and not anyone else; it is the most personal of judicial duties and requires impeccable integrity and conscience. No judge of the same or other court should inject himself and assume the authority to decide the matter.

It is submitted the refusal to recuse himself does not indicate the required sensitivity. In fact, it is submitted that it approaches judicial cynicism.

"As the statute now stands, the duty to disqualify is placed solely upon the District

Judge". United States v. Amerine, (6 CA 1969), 411 F.2d 1130, 1134. The fact that the judge was a district judge in that case is immaterial.

"...a prejudgment of the matter in issue will disqualify a judge". 48 C.J.S. §89 p 1077, n 74. Moskun v. United States (CCA Mich) 143 F.2d 129.

The amendment to the statute substituted the "reasonable factual basis - reasonable man" test for the former, subjective "in the opinion of the judge" test. It was intended to overrule the so-called duty to sit. Davis v. Board of Commrs., (CA 5 1975), 517 F.2d 1044, rehg. den., 521 F.2d 814.

The so-called duty to sit was an unjustified assumption frankly, induced by self-interest. This Court years before in Berger v. United States, 255 U.S. 22, 35, said "...for of what concern is it to a judge to preside in a particular case".

"...when the judge previously made a judgment as to the application of law to those

very facts the litigant would have to reverse the decision already made". 86 Harv.L.Rev. p 758.

Even under the subjective test, the judges disqualified themselves without reference to any statutory provision. For instance, Justice Frankfurter disqualified himself in PU Comm's v. Pollak, 343 U.S. 451, 66-67.

Chief Justice Stone testified on the Hearings on HR 2.08 before Subcomm. No. 4 of the House Comm. on the Judiciary, 78th Congress, 1st Sess. as follows: "It has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it...it was our manifest duty to take the same position."

A most remarkable example of complete judicial integrity is the unfortunate Motion to Recuse Chief Justice Rehnquist, then Associate Justice on the basis of his testimony while an Assistant Attorney General. The subject matter and the statements and the frame of reference in which made were obviously not a proper basis

for disqualification. Yet he filed extensive memoranda. Laird v. Tatum, 409 U.S. 824. Another extraordinary example of judicial integrity involved Associate Justice Thurgood Marshall in a proceeding involving an application pursuant to 28 U.S.C. §291(a) (for a certificate of necessity or an order pursuant to 28 U.S.C. §1651).

No Motion to Recuse Justice Marshall was made yet he denied disqualification, recognizing the motion and determining it. Meeropol v. Nizer, 429 U.S. 1337, 15 L.Ed. 2d 729, 31, 97 S.Ct. 687.

Neither Chief Justice Rehnquist nor Justice Marshall permitted any other Justice or Justices to determine the matter. More significantly, no other Justice assumed to do so.

Disqualification cannot be waived. McCuin v. Texas Power and Light Co., (5 CA) 714 F.2d 1255.

Respondent purported to oppose it by filing an opposition to which Petitioner

replied. The "opposition" was misleading. It cited 3 cases, 2 involving district court judges under 28 U.S.C. §144 and it cited Berger v. United States, supra. The standard under 28 U.S.C. §455(a) and the Code of Judicial Conduct was an entirely different standard of judicial ethics and disqualification. Significantly, Respondent did not consider any of Petitioner's authorities cited in her motion. Also significant, Petitioner offered to submit further authorities or briefs if Judge Alarcon requested.

Petitioner seriously questions an "opposition" can properly be made by third persons. This is so since the issue is exclusively with the named judicial officer.

Petitioner submits that upon being informed that he was "drawn" to the Panel, he should have disqualified himself.

Petitioner also submits he should have refused to participate with the other members of the Panel pending his failure to determine the Motion to Recuse him.

Petitioner also submits that it was a clear lack of impartiality for the other 2 members of the Panel to act as they did; it was improper to assume unauthorized authority.

Orders made by the 3 and in fact the Opinion, are tainted and void.

Petitioner refers to Cramp Sons v. Curtiss Turbine Co., 228 U.S. 645. It involved a district judge who had heard the case below and entered a decree which was under review in the Circuit Court of Appeals in which he later sat. Then §120 of the Judicial Code stated "That no judge before whom a cause or question may have been tried in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals". So far as this point is involved in the context of this case (which retains a stronger policy and legal disapproval of such conduct), over the apparent "excuse" that he "did not in substance form or express an opinion on the case in the first instance but merely entered a

pro forma decree for the purpose of enabling the case to be heard on appeal. This Court stated (p 650) "this contention is devoid of merit, since it must rest upon the conception that a trial judge, despite the express prohibition of the statute, may endow himself with power to sit in the court of appeals to review a decree by him rendered if only from a mistaken sense of duty he has adjudicated the merits of the case without considering them".

That is comparable to Judge Alarcon "endowing" himself with the power to ignore the motion for himself and to sit despite it and without deciding it. It is also comparable to his act in not recusing himself upon being informed of his appointment. It is also comparable to the acts of the 2 other members of "endowing themselves" with non-existing authority. The Supreme Court stated that the court of appeals "which passed upon the case, was virtually no court at all, because not organized in conformity to the law".

This statement is respectfully directed to

this Court. In Cramp the relief was to remand to "an inferior court lawfully constituted". There was no decision on the merits and that remand was appropriate. In this case there have been 2 decisions "on the merits", and almost 25 years of delay in the administration of justice due to Respondent. Various factors, partially disclosed in the briefs on the merits, urge this Court's review of the entire case (which it has the power to do) and determine it on the merits. In the last regard Petitioner respectfully refers this Court to its decision of Fitzgerald v. United States, 374 U.S. 16, 21, in applying its language and insight to the context of this case, "Whereas here, a particular mode of trial being used by many judges is so cumbersome, confusing, and time consuming that it places completely unnecessary obstacles in the paths of litigants seeking justice in our courts, we should not and do not hesitate to take action to correct the situation...".

Not only the period of time, but the

nature of the proceedings, Respondent's conduct, the elaborate semantic exercise of avoiding the simple, explicit federal tax plan which would have allowed Respondent to collect its tax immediately after 70 days after the assessment, urge this Court to decide the entire case. A remand to the Court of Appeals, even with specific directions, would further extend the unconscionable delay in Respondent's collection of the tax. Further, the opportunity to establish this Court's guidelines would be lost. Respondent's failure to execute its mandate is exclusively its responsibility.

(8) The Eighth Question Presented.

Whether it was an act of judicial impropriety for the other members of the Panel to assume to decide the Motion to Recuse Judge Alarcon. This was covered under the discussion of the Seventh question.

(9) The Ninth Question Presented.

This involves the persistent refusal to afford Petitioner relief in obtaining the

complete record including the Oral Argument on January 7, 1987 and the complete record on the remand ordered thereafter; also the right to listen to and obtain a transcript of the same official tape recording of the Oral Argument, which the second Opinion states Judge Alarcon listened to, but which Petitioner's attorney could not hear, other than a few words, in listening to what was represented to him to be the one official record, in the presence of, and under the control of 2 separate clerks in the Pasadena office of the Court. In sum whether this Court will exercise its power in that regard by direction that the record be completed and that this Court then determine this entire case on its full merits, most particularly the most critical issue, i.e., the supremacy of the federal tax laws regarding federal taxes, particulary federal estate taxes, and establish guidelines for probate estates throughout the Country and particulary in California. The Probate Court in this case has not seen determined the subject of its

orders to oppose Respondent and to have determined the correct law.

10. The Tenth Question Presented.

This refers to dogmatic opinion Silverman, 621 F.2d 961, was the "law of the case". It was so determined by the first and second Panels, the first including the then Judge Kennedy, the other 2 members who remain on it, and Judge Alarcon who was a member of the Panel on Silverman, and, who, as anticipated, decided that it was the "law of the case", although it was not. It was aware of the federal tax statutes involved, specifically federal estate tax statutes and the fundamental facts, i.e. the dates of the relevant events, i.e., the date of the tax return, the assessment, 6 year statute of limitations, what Respondent did and failed to do.

It completely ignored, in its opinion, the Equity Judgment, the nature of Petitioner's community property interest, the fact that federal estate taxes are not at all concerned with, nor affected by, the California creditors

claim procedure.

Nor Petitioner's argument that the "taxpayer" is not the estate but the executor and administrator and that there was the said federal tax plan mandating the Secretary to take the 2 steps, requiring 60 days and 10 days whereupon levy could be made.

The opinion is contrary to that federal tax plan. It approves the Secretary's conduct, which obviously must have been knowingly contrary to the explicit mandate to him.

So, in the first place it was erroneous statement of law; it did not follow Bowers, in fact ignored it since it was cited to it. The Panel in the Second Appeal also ignored Bowers, the Equity Judgment, and the law regarding Petitioner's community property rights, among other issues.

It approved the unprecedented, and completely inexcusable, length of time the Secretary caused by his conduct, the time approximating a substantial part of lifetimes of persons involved, Petitioner and her

attorney. Those factors add up to severe injustice.

Petitioner's Closing Brief fully covers this and demonstrates, with appropriate citations, that the so-called "doctrine" is a matter of convenience, is not any limitation of the power of the court to review decisions and correct them.

England v. Hospital of the Good Samaritan, 14 C.2d 791, 795, 97 P.2d 813, said,

> "The Doctrine of the law of the case is recognized as a harsh one...and the modern view is that it should not be adhered to when the application of it results in a manifestly unjust decision...procedure and not jurisdiction is involved...the later decisions not only recognize several kinds of exceptions to the application of the doctrine...but also reject the notion of limited power...and treat the doctrine as merely one of policy and of normal practice".

This Court held that it is not bound by the "law of the case". Charles Christianson v. Colt Industries Operating Corp., (1988), 486 U.S. - , 108 S.Ct. 2166, 100 L.Ed. 2d 811.

At 100 L.Ed. 2d 831, this Court held:

> "A court has the power to revisit prior decisions of its own or of coordinate courts in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as when the initial decision was 'clearly erroneous and would result in manifest injustice'...once it concluded that the prior decision was 'clearly wrong' it was obliged to decline jurisdiction...most importantly, law of the case cannot bind this Court in reviewing decisions below...a petition for certiorari can expose the entire case to review...just as a district court's adherence to 'law of the case' cannot insulate an issue from appellate review, a Court of Appeals' adherence to the law of the case cannot insulate an issue from this Court."

Christianson and England are encouraging- that we have left behind (not quite far enough) the rigidity of the common law. The Court of Appeals knew of England and similar cases since they were cited in Petitioner's Closing Brief. Christianson was 2 years coming.

The Court of Appeals also knew of Christianson (and Cramp). They were cited in the Petition for Rehearing.

(11) The Eleventh Question Presented.

Since this relates to the subject of the law of the case, it is adequately covered under paragraph 10.

(12) The Twelfth Question Presented.

This subject was covered in Petitioner's Closing Brief pp 8-9. Respondent, as noted, adopted the court's position regarding levies, as noted, and the language of Silverman implied, at least, that levies could not be made. Petitioner repeatedly contended not only that they could be made, that the federal tax law regarding federal estate taxes was supreme and that it provided for levies and that the power to make the levies could not be obstructed; this was fully submitted to the trial court and to the Court of Appeals.

Petitioner noted, supra, that her attorney requested then Judge Kennedy to adopt the levy made in 1986, a copy of which was attached to the Closing Brief (the request, of course was made to the Panel). His reply was that if it was considered relevant the Court would

communicate with Petitioner's attorney. It never did.

The legal question is the position that levies were not made and could not be made was untrue; in that event should not the courts, trial and appellate, have acknowledged and correctly applied that true fact (which would have contradicted Silverman and would have required different results at that stage and subsequent to and including the date of the last judgment).

The question was answered affirmatively in the Closing Brief.

All courts have inherent power to do justice and that means to determine the truth and that if subsequent events and documents establish the truth, which was obscured or misrepresented in the past, but during the proceedings, the courts will apply the truth as disclosed by the late discovery of the truth.

The fact is, of record, that the trial and appellate courts ignored that issue and the authorities and decided the case on the

assumption that the representations and statements made that levies could not and were not made were true.

They were not true.

Levies were made in 1966, as noted, and 1986 as noted, and to emphasize the injustice of this matter, levies were made as late as July 21, 1989.

This Court stated the correct law regarding such matters in Dakota County v. Glidden, 113 U.S. 222, 225. It held,

> "but this court is compelled, as all courts are, to receive evidence dehors the record affecting their proceeding in a case before them..."

(13) The Thirteenth Question Presented.

This is a part of 12 and is covered under that paragraph. The thrust of this question was not only whether the Court has the power but, in effect, the obligation to recognize and accept the true facts as described under 12.

In Dakota this Court said that courts are "compelled" to do so.

(14) The Fourteenth Question Presented.

This, in effect, is whether the Court will, through a Petition for Writ of Certiorari, review the entire case and do justice in its decision. Christianson answered this question, as noted. Further, an aspect of the Court's power was stated in Fitzgerald, supra, i.e., that the Court would "correct the situation" referring to "unnecessary obstacles in the paths of litigants seeking justice in our courts".

(15) The Fifteenth Question Presented.

This referred to a different, and broader, aspect of the same subject in 14 and is sufficiently, for this Petition, covered thereby.

Wherefore, Petitioner respectfully prays for an order granting this Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals in this case. Included therein is Respondent's conduct in not openly disclosing of record and in fact in correcting the Court of Appeals in its inflexible contention regarding levies.

Dated: October 30, 1989

Respectfully submitted,

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